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No. 70-252

Supreme Court, U.S.
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Supreme Court of the United States

OCTOBER TERM, 1971

INTERNATIONAL UNION OF OPERATING ENGINEERS,
Petitioner,

v.

METROPOLITAN PAVING COMPANY, INC.,
GILL CONSTRUCTION COMPANY, and
TECON CORPORATION, formerly
joint venturers, doing business
as METROPOLITAN-GILL-TECON.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY FOR PETITIONER

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1. In the instant case the jury was instructed that all strikes "for the purpose of requiring [an employer] to reassign work theretofore assigned to [members of another] union" are proscribed by §§ 8(b)(4)(D) & 303 of the Taft-Hartley Act. R.I-98-99. That reading of the Act's jurisdictional dispute prohibition is the broadest the language will bear. The burden of the argument in MGT's Brief In Opposition is that the lower courts' expansive interpretation of §§ 8(b)(4)(D) & 303 is correct. Br. In Opp. pp. 6-7, 13.

NLRB v. *Local 825 IUOE*, 400 U.S. 297, upon which MGT attempts to build its argument (Br. In Opp. pp. 7-9), however, thoroughly exposes the fatal flaw in the Company's reliance on the Act's literal language. For *Local 825 IUOE* is the third, and most recent, of this Court's opinions explicitly recognizing that § 8(b)(4)(D) "applies to neutrals; . . . that section is aimed at protecting 'the employer trapped between the . . . claims' of rival unions. *National Woodwork Mfrs. Assn.* v. *NLRB*, 386 U.S. 612, 625 (1967)." And precisely because Congress intended to protect only neutral employers "caught between the devil and the deep blue" (*NLRB* v. *Radio and Television Broadcast Engineers Union (CBS)*, 364 U.S. 573, 575), this Court has defined "a jurisdictional dispute under § 8(b)(4)(D)" as "a dispute between two or more groups of employees over which is entitled to do certain work for an employer" (*id.* at 579). Thus our position—that a finding that the strike in question grew out of an inter-union dispute is the essential prerequisite to the conclusion that § 8(b)(4)(D) has been violated—though rejected by the courts below, rests squarely on this Court's teachings. It is not, as MGT would have it, an "attempt to engraft" a new requirement into the Act. Br. In Opp. p. 7.

2. MGT would dispose of *CBS*, and Judge Leventhal's application of the principles enunciated therein in *Plasterers Local Union No. 79* v. *NLRB*, 440 F.2d 174 (C.A.D.C.) cert. granted 401 U.S. 973 (Nos. 70-63, 70-65 This Term), on the ground that the ultimate issue in both was "the authority or the duty of the Board in a 10(k) hearing." Br. In Opp. pp. 5-6. This assumes that the law developed in § 8(b)(4)(D) Board cases is wholly inapplicable in § 303

court suits. But that assumption is belied by the very structure and language of § 303. For that section does not set out an independent prohibition; it interdicts "conduct defined as an unfair labor practice in section 8(b)(4)." Thus there is no authority more germane to the issue posed in the instant case than this Court's *definition* of "a jurisdictional dispute under § 8(b)(4)(D)" in *CBS*. Indeed throughout the Opposition MGT itself relies on Board cases. Br. In Opp. pp. 8-9, 10-11. And MGT's attempt to dismiss *Plasterers* as an irrelevancy even though it, like the instant case, turns on the implications of the *CBS* definition can not obscure the point that the questions presented in both are intertwined. Pet. pp. 7-11. The decision to hear *Plasterers* is, therefore, plainly a major consideration in assessing the propriety of a grant of certiorari here.

3. As a secondary line of defense MGT argues that the fact that a member of the Laborers Union performed the work in question in compliance with the Company's assignment is sufficient to establish the existence of a jurisdictional dispute. Br. In Opp. pp. 7-12. This argument is unsound in principle and unsupported by the cases.

The Company's equation of the performance of assigned work with a claim for work requires unions which do not wish to encroach on another's traditional unit work to order their members to refuse their employer's assignment. But an employee's refusal to perform the job assigned to him is ground for discharge. *NLRB* v. *Montgomery Ward*, 157 F.2d 486, 496 (C.A. 8). Thus if MGT's contentions were accepted, the Act would place *employees* "between the devil and the deep blue" (*CBS*, 364 U.S. at 575) in the

event they choose not to cooperate with an employer's attempt to "create [a jurisdictional] dispute by transferring work away from the only group claiming the work" (*Local 107 Teamsters (Safeway Stores)*, 134 NLRB 1320, 1323). Accordingly, the Board has squarely held that acceptance of an employer's assignment by the members of a union is not a claim to the work by that union. *Local 328 Lathers (Acoustics & Specialties Inc.)*, 139 NLRB 598, 599-600. The court cases cited by MGT (Br. In Opp. pp. 8-11) are not to the contrary.[1]

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[1] *Local 825 IUOE* actually draws the distinction which we believe is critical but which the Company seeks to override. As the Third Circuit noted in the portion of its opinion directly following the paragraph quoted in the Opposition (at p. 9):

> "More important, the Ironworkers Union and the Union of Operating Engineers were opposing parties in the ensuing proceeding before the Joint Board to determine which craft should perform the work in question. The Ironworkers prevailed, thereby establishing their right to the work under the procedure agreed to by all of the parties. Thereafter, ironworkers performed the work as a matter of established right. And they have not disclaimed that right." 410 F.2d at 8.

Here, on the other hand, the Laborers did not seek to establish a claim of right. Indeed they unequivocally disclaimed the work. Pet. n. 2 at pp. 4-5.

The very passages from *Carpenters* v. *C. I. Montag & Sons*, 335 F.2d 219 (C.A. 9) cert. denied 379 U.S. 999, and *NLRB* v. *Local 1291 ILA*, 368 F.2d 107 (C.A. 3) cited at pp. 9-11 of the Opposition demonstrate that those cases do not support MGT's position here. *Carpenters* and *ILA* stand for the common-sense proposition that since the employer's main interest is in the economics of the situation, an insistence by the union holding the jobs that its members get paid for that work, whether or not they actually do it, is sufficient to establish a claim for the purposes of §§ 8(b)(4)(D) & 303. But the Laborers made no such demand here; indeed there is no evidence of any kind which places that union's clear disclaimer in question.

4. In its statement of the case (Br. In Opp. pp. 4-5) MGT endeavors to create the impression that the jury instructions incorporated the Union's position by quoting one sentence from a lengthy preliminary statement on the elements of a "jurisdictional strike." Compare Pet. n. 4 at pp. 6-7 which sets out this portion of the charge in its entirety. But whatever the jury might have made of this sentence if it had stood alone, it could not have been understood as MGT would now construe it because the District Court concluded by unqualifiedly instructing the jurors:

> "The issues and matters to be determined by the jury in this case are as follows:
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> * * *
>
> "Second: Did the [Union] induce or encourage [MGT's] employees to cease work or to refuse to perform work for [MGT] with the object or purpose or intent to require or for the purpose of requiring [MGT] to reassign work theretofore assigned to one or more labor unions to other or different labor unions:
>
> "If your unanimous answer to the foregoing question (2) is 'NO,' you should return a verdict in favor of the [Union]; but if your unanimous answer is 'YES,' you then have a third question to determine. . . ." R.I-98-99.

The Union's objection to the charge as it related to ". . . jurisdictional strikes, because the instruction fails to limit the jury in its consideration to the existence of a[n] existing active dispute resulting from the contentions of two contesting groups of employees or labor organizations . . ." was overruled. R.VII-1347.

Thus, the jury was plainly misadvised as to the law. This

being so, the portions of the Opposition (pp. 1-5, 13) devoted to the contention that there was sufficient evidence to establish an inter-union dispute are, in addition to being contrary to the record, beside the point.[2]

5. As demonstrated above, and in the Petition, the Union was assessed $163,224.29 in damages on the basis of a theory as to essential elements of a §§ 8(b)(4)(D) and 303 violation contrary to that expressed in this Court's opinions in *CBS*, *National Woodwork* and *Local 825 IUOE*. The issue raised by the lower courts' refusal to follow this Court's *CBS* definition of "a jurisdictional dispute under § 8(b)(4)(D)" is at the heart of §§ 8(b)(4)(D) & 303 law; has, as the Opposition itself indicates (at pp. 9-12 and n. 8), been a constant subject of litigation in the courts of appeals; and is closely related to the issue this Court has already agreed to consider in the *Plasterers* case. The Petition should therefore be granted.

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[2] It is our position here, as it was below, that MGT completely failed in its attempt to prove that there was an inter-union dispute in the instant case, and that if the proper legal standard had been applied a directed verdict for the Union would have been required. Thus if certiorari is granted we will seek an order reversing and remanding with instruction to enter judgment for the Union, not simply a reversal for a new trial. Cf. *Neely* v. *Eby Construction Co.*, 386 U.S. 317. We have referred to the jury instructions throughout not because we believe the case should have gone to the jury but because the Union's Motions For A Directed Verdict and for Judgment N.O.V. were denied without opinion. R.I-114; VI-1056; VII-1322. Thus the instructions contain the only statement of the legal standard applied below.

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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